

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 453 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

MUMTAZBEN JUSABBHAI

Versus

MAHEBUBKHAN USMANKHAN PATHAN

Appearance:

MR BP MUNSHI for Petitioner

MR DEEPAK M SHAH for Respondent No. 1

Ms.B.R.Gajjar, Ld.APP for respondent No.2

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 11/09/98

ORAL JUDGEMENT

1. Heard Mr.B.P.Munshi Ld.advocate for petitioner,
Mr.D.M.Shah, Ld.Advocate for respondent No.1 and

Ms.B.R.Gajjar, Ld.APP for respondent No.2-State.

2. The petitioner is a Mahomedan by religion and is the wife of respondent No.1. The petitioner filed Cri.Misc.Appln No.1098/90 in the Court of Ld.CJM, Jamnagar under section 125 of Cr.P.C, 1973 (hereinafter referred to as "the Code") claiming maintenance from the respondent No.1 on the ground that the respondent No.1 has neglected her and has refused to maintain her despite having sufficient means. That vide order, dated 16.3.93 the Ld.CJM, Jamnagar awarded amount of Rs.350/-p.m. to the petitioner by way of maintenance payable by the respondent No.1 w.e.f. 24.7.90. The court has also awarded costs of Rs.200 to be paid by the respondent No.1 to the petitioner.

3. The respondent No.1 carried the matter to the Sessions Court at Jamnagar by filing Cri.Revn.Appln.No.46/93. That by order, dated 16.6.97 the Ld.Addl.Sessions judge, Jamnagar allowed the revision application and set aside the above stated order of maintenance passed by the Ld.CJM, Jamnagar. Being aggrieved and dissatisfied by the said order of the Ld.Addl.Sessions Judge, Jamnagar the petitioner has filed the present revision application.

4. Mr.Munshi, Ld.advocate appearing for the petitioner has taken me through the impugned judgment and orders which are produced at running pages 1 to 22 of the file and has urged that the ld.Addl.Sessions judge, Jamnagar has committed error of law by holding that respondent No.1 having given "Talaq" to the petitioner, the petitioner is not eligible to claim maintenance under section 125 of the Code. It is also submitted by Mr.Munshi that the Ld.Addl.Sessions Judge has disregarded the rule settled by this court in the matter of ARAB AHMADIA ABDULLA vs ARAB BAIL MOHMUNA Saiyadbhai and others reported in AIR 1988 Gujarat 141 and has held that in the facts and circumstances of the case the petitioner-wife was not entitled to claim maintenance under section 125 of the Code, which is contrary to the settled proposition of law and thereby the impugned judgment and order deserves to be quashed and set aside and the orders of the Ld.CJM, Jamnagar, dated 16.3.1993 in the proceedings of Cri.Misc.Appln.No.1098/90 is required to be restored. Mr.D.M.Shah, ld.advocate appearing for respondent No.1 has placed reliance on the observations made by the ld.Addl.Sessions judge in para 11 of the impugned judgment to contend that no sooner there is a declaration of divorce before the court, the court has no jurisdiction to grant maintenance under

section 125 of the Code. That the divorced wife would be entitled to only maintenance and other benefits as provided under the provisions of Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as "the Muslim Women Act, 86"). Mr.Shah has attempted to support the impugned judgment by referring to the provisions of Muslim Women Act, 86.

5. It may be noted that the Muslim Women Act'86 does not take away the rights which the Muslim woman was having either under the Personal Law or under the general law, i.e. Section 125 to 128 of the Code. In other words, the Muslim woman, even after the "Talaq" could claim maintenance from her former husband either under the provisions of Section 125 to 128 of Code, or under section 3(2) of the Muslim Women Act'86, if she is otherwise entitled to claim the maintenance under the law. That the provisions of Section 5 of Muslim Women Act'86 provide option to the parties, to be governed either under section 125 to 128 of the Code or under the provisions of Special Statute, the Muslim Women Act'86 and as such the application filed by a divorced muslim woman under section 3(2) of the Muslim Women Act'86 could be disposed of by the Court by following the provisions of Section 125 to 128 of the Code.

6. That in the instant case, the respondent No.1-husband contested the claim of maintenance as made by the petitioner-wife in the proceedings of Cri.Misc.Appln.No.1098/90 by filing reply-Exh.10, and contended that the petitioner wife had left the matrimonial home without any just or reasonable cause, and as such, she was not entitled to claim maintenance. It was further contended that on demand of petitioner-wife , the respondent No.1-husband had given her "Talaq" on 21.6.90, in the presence of witness one Asaraf Hasanbhai and Hassnbhai Bakalawala and thereby also the petitioner-wifew is not entitled to any maintenance from respondent No.1-husband under the provisions of Muslim Women Act'86. That during the trial, the respondent No.1-husband produced a sealed envelop with postal remarks of "refused". That during the oral evidence of husband said envelop was opened in the court and the document of "Talaq-nama" contained in the said envelop was taken on record vide Exh.41. That Exh.41 contained attestation by above stated two witnesses, however, the respondent No.1-husband failed to examine the said attesting witnesses in the court and also failed to produce any other evidence to establish the factum of legal and valid "Talaq" between the

parties. That during the arguments, it was submitted on behalf of the respondent No.1-husband that the postal remark of "refusal" on the registered article leads to the adverse inference against the petitioner-wife to the effect that same was received by her. That as such the Talaq was effected and as a divorced wife the petitioner-wife was not entitled to claim maintenance as provided under the Muslim Women Act'86. That the trial court has refused to accept the said submissions on two grounds. It is held by the trial court that in the absence of evidence of attesting witnesses, the respondent No.1-husband has failed to prove the communication of legal and valid "Talaq" to the petitioner-wife. Further more the document of so-called "Talaq-nama" Exh.41 did not contain any averments regarding payment of "mahr" or "dower" to the petitioner-wife. That in the absence of any evidence to show that the respondent No.1-husband has paid or had agreed to pay any amount towards reasonable provision and maintenance of the wife and the agreed amount of Mahr or dower, the claim of the respondent No.1-husband regarding giving Talaq to the petitioner-wife as per said "talaq-nama" could not be said to be bonafide. That on the said facts and the reasoning the trial court has given a finding of fact that the respondent No.1-husband having failed to prove the legal and valid talaq the petitioner-wife has continued to be the lawful wife of the respondent No.1-husband and as such respondent No.1 is liable to pay maintenance to the petitioner.

7. That the trial court has rightly followed the observations made by this court in the matter of A.A.Abdulla vs Mohmuna Saiyadbhai reported vide AIR 1988 Guj.141 and has held on the facts of the case that even if it is assumed that the petitioner-wife is a divorced wife of respondent No.1-husband, in view of the fact that the respondent No.1-husband has failed to make any reasonable and fair provisions and maintenance to be made and paid to the petitioner-wife within the iddat period by the respondent No.1 as former husband, the petitioner is entitled to claim the same under section 3(2) of the Muslim Women Act'86. That as there is no conflict between the said provisions and the provisions of sections 125 to 128 of the code, the respondent No.1 is liable to pay the maintenance to the petitioner-wife. Thus the order of granting maintenance to the petitioner by the trial court, as stated hereinabove, being not only legal but just, proper and reasonable, the Addl.Sessions Judge ought not to have interfered with the same in the proceedings of Cri.Revn.Appln.No.46/93.

8. That the legislative intent and object of the Muslim Women Act '86 has been construed by this court in the context of provisions of the said Act, as well as provisions of Secs 125 to 128 of the Code, in the matter of A.A.Abdulla (supra) and has derived material and relevant conclusions as under:

(a) Under the Muslim Women Act, a divorced woman is entitled to have a reasonable and fair provision from her former husband. Reasonable and fair provision would include provision for her future residence, clothes, food and other articles for her livelihood. She is also entitled to have reasonable and fair future maintenance. This is to be contemplated and visualised within the iddat period. After contemplating and visualising it, the reasonable and fair provision and maintenance is to be made and paid to her on or before the expiration of iddat period. This contemplation may depend upon the prospect of the remarriage of the divorced woman. If the former husband fails or neglects to make or pay a reasonable and fair provision and maintenance, then the divorced woman is entitled to recover it by filing an application under section 3(2) of the Act. The determination of reasonable and fair provision and maintenance depends upon the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband. This conclusion is inescapable in view of the different phraseology used by the Parliament in section 3(1) and its clauses and section 3(3), section 3(1)(a) contemplates reasonable and fair provision and maintenance. Section 3(3) lays down objective criteria for its determination. Under section 3(1)(b) reasonable and fair provision and maintenance is to be made and paid only for a period of two years from the respective dates of birth of children. While the Parliament has not prescribed any such period under section 3(1)(a). Section 4 only provides for reasonable and fair maintenance. Apart from this, even Section 5 gives option to the parties to be governed by the provisions of Ss.125 to 128 of the Criminal P.C.

(b) Under section 4 of the Muslim Women Act a divorced woman is entitled to get maintenance from her relatives such as her children or parents or from Wakf board if she is not able to

maintain herself after the iddat period from the provision and maintenance made and paid by her former husband.

- (c) As per the provisions of Section 5 the application filed under Section 3(2) of the Muslim Women Act by a divorced woman can be disposed of by following the provisions of Ss.125 to 128 of the Criminal PC if the divorced woman and her former husband file affidavits to that effect.
- (d) Under section 7 of the Muslim Women Act, all applications filed by a divorced woman under section 125 or under section 127 of the Cri.P.C. which are pending for disposal before the Magistrate on the date of the commencement of the Act are required to be disposed of by the Magistrate in accordance with the provisions of the said Act.
- (e) There is no provision in the Muslim Women Act which nullifies the orders passed by the Magistrate under section 125 or 127 of the Cr.P.C. ordering the husband to pay maintenance to the divorced woman or takes away the vested rights which are crystalized by the orders passed under section 125 or 127 of the Cr.P.C.

9. That the observations made by the Ld.Additional Sessions Judge, Jamnagar vide para 11 of the judgment rendered in the Cri.Revn.Appln.No.46/93 suggest that the court has misconstrued the proposition of law settled by this court in the matter of A.A.Abdulla (supra) and has misdirected himself to the facts and circumstances involved in the matter. That thereby he has committed jurisdictional error by setting aside the order passed by the Ld.CJM dated 16.3.93 in the proceedings of Cri.MA No.1098/90, and hence, in my opinion petition deserves to be allowed and the order of the ld.Addl.Sessions judge Jamnagar dated 16.6.93 in the proceedings of Cr.Revn.No.46/93 require to be quashed and set aside and the order of Ld.CJM dated 16.3.93 passed in Cri.Misc.Appln.No.1098/90 has to be restored. Rule is made absolute accordingly.

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